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No. 612

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

SHEILA JAMES DEL GUERCIO,

Petitioner,

against

EDMUND H. JAMES,

Respondent.

BRIEF OF RESPONDENT, EDMUND H. JAMES, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Opinions Below

The opinions of the Supreme Court of the State of New York, County of Westchester, rendered by Mr. Justice John J. Dillon, are printed in the Appendix hereto (16 and 21).*

Jurisdiction

The order of the Court of Appeals of the State of New York sought to be reviewed was entered on June 15, 1967; it was served by mail on June 27, 1967, and is printed in the Appendix hereto (23).

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

References herein to the appendix in this Court are by page number. References herein to the Record on Appeal in the Courts below are by page number followed by the letter "a".

Questions Presented

Whether the courts of the State of New York may properly exercise jurisdiction over the petitioner and the infant child of the above parties where the petitioner had, pursuant to a matrimonial agreement, bound herself to submit to the jurisdiction of New York State courts, and where she had also previously, in the proceeding appealed from, without any reservation or special appearance, engaged in litigation on the merits before the courts of said State, concerning the custody of said child.

Whether the courts of the State of South Carolina must give full faith and credit to the prior orders of the courts of the State of New York.

Whether an illegal act, to wit, the withholding of said infant child by the petitioner from the respondent, in violation of a concededly valid court order, can result in conferring jurisdiction upon the courts of the State of South Carolina and, contrariwise, in ousting the New York State courts from exercising jurisdiction to implement its orders.

Statute Involved

The statutory provision involved is Section 240 of the Domestic Relations Law of the State of New York, which reads as follows:

> "In any action or proceeding brought (1) to annul a marriage or to declare the nullity of a void marriage, or (2) for a separation, or (3) for a divorce, or (4) to obtain, by a writ of habeas corpus or by petition and order to show cause, the custody of or right to visitation with any child of a marriage, the court must give such direction, between the parties, for the custody, care, education and maintenance of any child of the parties, as, in the court's discretion, justice requires, having regard to the circumstances of the case and of

the respective parties and to the best interests of the child. In all cases there shall be no prima facie right to the custody of the child in either parent. Such direction may make provision for the education and maintenance of such child out of the property of either or both of its parents. Such direction may require the payment of a sum or sums of money either directly to the wife or to third persons for goods or services furnished for such child, or for both payments to the wife and to such third persons. Such direction may be made in the final judgment in such action or proceeding, or by one or more orders from time to time before or subsequent to final judgment, or by both such order or orders and the final judgment. Such direction may be made notwithstanding that the court for any reason whatsoever, other than lack of jurisdiction, refuses to grant the relief requested in the action or proceeding. Any order or judgment made as in this section provided may combine in one lump sum any amount payable to the wife under this section with any amount payable to the wife under section two hundred and thirty-six. Upon the application of either the husband or the wife, or of any other person or party having the care, custody and control of such child pursuant to such judgment or order, after such notice to the other party or parties or persons having such care, custody and control and given in such manner as the court shall direct, the court may annul or modify any such direction, whether made by order or final judgment, or in case no such direction shall have been made in the final judgment may, with respect to any judgment of annulment or declaring the nullity of a void marriage rendered on or after September first, nineteen hundred forty, or any judgment of separation or divorce whenever rendered, amend the judgment by inserting such direction. Subject to the provisions of section two hundred forty-four of this chapter the authority

granted by the preceding sentence shall extend to unpaid sums or installments accrued prior to the application as well as to sums or installments to become due thereafter."

Statement

The parties hereto were married in the State of New York and resided there for a number of years until there was a separation and the petitioner transferred her residence to Florida, where she instituted a divorce action. In 1959 a separation agreement was executed between said parties, whereby said petitioner-mother voluntarily surrendered all of her rights to the custody of the infant child of the parties herein except for minimal visitation rights to be exercised only in New York. The child was then four years old. Thereafter, she secured a divorce with the cooperation of the respondent.

After said divorce said parties remarried, and the petitioner moved to South Carolina with her new husband. The respondent continued to reside in the State of New York for a while but thereafter moved (along with said child) to New Jersey, where they presently reside.

The petitioner, despite her residence in the State of South Carolina, nevertheless, in 1963, made application to the courts of the State of New York to modify said agreement and custody decree, and to increase her visitation rights. Upon said application being heard, the Appellate Division thereupon did modify the decree insofar as the child was concerned, to the extent of granting the mother visitation rights for summer vacations, to wit, July and August of every year, but upon the condition that she would purchase and file a surety company bond in the amount of $25,000 to insure the return of the child to the father.

The petitioner, being quite content with the order of said Court in the State of New York, thereupon did obtain such a bond and furnished same for the benefit of the respondent.

Thereafter, for two summers, said petitioner obtained temporary custody of said child and, at the conclusion of said periods, returned him to his father. In August, 1966, the petitioner decided that she would not return the child; and moreover, she proceeded to institute litigation in South Carolina to overcome not only the aforementioned matrimonial agreement, insofar as it concerned the custody of the child, but also with respect to the orders of the courts of the State of New York.

Upon being so apprised said respondent instituted a proceeding in the Supreme Court of the State of New York, County of Westchester, directed towards compelling said petitioner to return the child to the custody of the respondent, to hold her in contempt of court and also to declare the aforementioned surety company bond forfeited. This motion of the respondent was granted (20), insofar as the first two items of relief were concerned; the third was denied because the surety company had not been served with process. Said decision permitted the petitioner to contest the application on the merits and the opportunity so afforded was accepted. But after a review of the affidavits the lower court adhered to its prior decision (21). The petitioner appealed said decision to the Appellate Division of the Supreme Court of the State of New York, Second Department, which nevertheless unanimously affirmed the decision of the lower court (22).

The petitioner then made application to the Court of Appeals of the State of New York for leave to appeal to that Court, but the application was denied (23).

The petition contains unfair, undocumented and unfounded statements (at p. 5) as to the child's home with

the respondent—but there is absolutely nothing in the records of the foregoing proceedings in the courts below to support said statements, and they have been improperly included to color the petition herein and to influence this Court. In other words there is no evidence whatsoever to support any claim of "changed circumstances", and this is a *sine qua non* in a change of custody action.

Bluntly speaking, this petitioner, as aforestated, waived any right which she might have to the custody of her son in order to obtain the acquiescence and cooperation of the respondent to her obtaining a divorce so that she could be free to marry a very wealthy man, her present second husband (23a). Nonetheless, one may derive a realistic appraisal of the petitioner's character from such a callous surrender of her child, and the subsequent flouting of a court order demanding that she return the child.

During the custodial periods she has undoubtedly surrounded the child with unaccustomed luxuries which, of course, might sway a child twelve years old; but material comforts have been time and again held not a criterion whereby a court should determine custody rights.

Argument

I

The petitioner has contractually submitted herself to the jurisdiction of the courts of New York State by virtue of the matrimonial agreement entered into between the parties (19). It has been held that one or more contracting parties may bind themselves to submit to the jurisdiction of a particular state. *Esperti* v. *Cardinale Trucking Corp.*, 263 A. D. 46, 47. This factor alone distinguishes the facts at bar from all others cited by the petitioner, and surely should estop her from claiming a lack of due process.

Moreover, prior to the instant proceeding, this petitioner had participated in other similar litigation in the State of

New York in 1963 without any special appearance or the uttering of any complaint about the exercise of jurisdiction by said courts (17).

It is of sufficient importance to be determinative of this application, that the petitioner interposed objections on the merits, and without a special appearance, when suggested by a court below (27a), thus unequivocally recognizing and accepting the right of the court to adjudicate upon the issues herein.

As was stated by Mr. Justice Dillon, with keen perception (18):

> "Although the child's mother was then, as she is now, a resident of South Carolina, she invoked the jurisdiction of New York to her own advantage. It was the order in that proceeding which enabled her to take the child lawfully into the state of her own residence. The jurisdiction then acquired by New York is a continuing one.
>
> ". . . Here the court directed, in the order to show cause, that service be made upon an agent appointed by the mother for that purpose in the separation agreement of December 9, 1959. . . . The effectiveness of the notice is established by the fact that the mother appeared by counsel on the return day. The mother therefore had adequate notice; but the point is that this is not regarded by the court as a new and independent proceeding, but merely as a motion in the same proceeding as that instituted by the mother in 1963. The New York court has never lost jurisdiction of the parties to that proceeding or of its subject-matter, which was the custody of the child. Any other conclusion would make a mockery of the court's authority."

There is sound authority supporting the retention of jurisdiction by the New York courts. *Church* v. *Church*,

23 Misc. 2d 189; *In re Kades*, 23 Misc. 2d 222; *People ex rel. Ludden* v. *Winston*, 34 Misc. 21, aff'd 61 A. D. 614.

What right has South Carolina to assume that New York will rule adversely to the best emotional and physical interests of the child? Why should this ultimate tribunal conclude that South Carolina, merely by virtue of the accidental and illegal presence of the child in that jurisdiction, will render a decision which will be compatible with the best interests of the child?

Assuming, *arguendo*, that New York has the paramount claim to jurisdiction, the possibility of a provincial approach by South Carolina has drawn adverse comment. Foster-Freed, "The Law and the Family," Vol. 2, page 562, cogently declares:

> "The sad fact is that far too many modification cases clearly indicate a prejudice for the local citizen and hostility against a party from another state and the courts in their anxiety to safeguard what they regard as the proprietary interest in the child have done great damage to his real best interests."

This Court ought not, it is respectfully urged, overlook the fact that it ill-becomes the petitioner to belatedly express her alleged motherly concern for this child when she had, for selfish reasons, waived any right to his custody when she entered into the matrimonial agreement in 1959 (16).

The petitioner pointedly neglected to include the report of her alleged investigators in the papers filed in the lower court (36a). Thus, all that is presented to this Court is a bare, *ex parte*, conclusory and self-serving statement that the environment at the father's home is unsatisfactory, but not one shred of supporting evidence.

As aforestated, further justification for New York to retain jurisdiction may be obtained from the fact that the

petitioner, as aforementioned, was obligated by court order and did, thereafter, file a surety company bond to assure the return of said child. This may be deemed tantamount to the petitioner having property within New York not only to indemnify the respondent for any financial loss but also to guarantee that she would be at all times amenable to the jurisdiction of the courts of New York.

The fact that the petitioner considered New York as being the proper forum may be judged from her resort to this State in 1963, when she desired a modification of the custody provisions (33a and 52a).

And it may be readily assumed that had the respondent deliberately refrained from turning over the child to the petitioner for the summer months of 1966, she would not have appealed for relief to the courts of either South Carolina or New Jersey, but rather New York; for South Carolina would have refused to rule on the problem, since neither the respondent or the child were there, and New Jersey could have refused by declaring that there was no local court order before it which could be found to have been violated.

Due process of law has been extended to the petitioner and the foregoing provides sound reasons and every justification for South Carolina to extend full faith and credit to the orders of the New York State courts.

Some reliance is placed by the petitioner upon *May* v. *Anderson,* 345 U. S. 528, 73 S. Ct. 840, 97 L. Ed. 1221. However, there are vital distinguishing facts between that case and the one at bar. There the mother did not participate in the proceedings in Wisconsin, where the father had obtained an *ex parte* divorce decree, which also awarded him the custody of the children. It was there held that there was no compliance with due process of law because the very service of process of the Wisconsin court was deemed invalid since it concerned the custody of children (although it was adequate insofar as obtaining jurisdiction for the purpose of securing a divorce).

Thus, this court held that no *in personam* jurisdiction was obtained. But, contrariwise, in the instant case there is *in personam* jurisdiction, since the petitioner duly appointed an attorney as her agent to receive process on her behalf (11a). *Esperti* v. *Cardinale Trucking Corp.*, 263 A. D. 46, 47 (*supra*, p. 6). It cannot be emphasized too strongly that never at any time in the course of the litigation in the courts below has the petitioner ever denied either said appointment or its validity and binding effect upon her (26a). In the facts at bar the withholding of the child after the custodial period had expired was tantamount to an abduction.

It is respectfully urged that the dissenting opinion of Mr. Justice Jackson in *May* v. *Anderson* is more persuasive and applicable to the facts at bar.

And again we find distinguishing features in *Kovacs* v. *Brewer*, 365 U. S. 604, 2 L. ed. 2d 1008, 78 S. Ct. 963, which coincidentally concerned a New York custody decree, the action was retorned to the North Carolina, courts for "clarification" in order "to determine the issue of changed circumstances" (p. 608). At bar no evidence at all was presented, in fact no hearing was held in South Carolina as to this problem. Accordingly since the last formal determination as to the custodial problem was made in New York, with both parents before the court, that decree must be fully recognized in South Carolina.

Parenthetically it may be noted that the mother in the *Kovacs* action moved with something less than alacrity to secure possession of her child (p. 605), i.e., 14 months after the custody award, and somewhat similarly in the instant action, the mother exhibited lack of parental zeal for her child when she sought to be relieved of the need to accept the child for the month of July, 1966 (44a).

II

The petitioner has committed a calculated, illegal act in withholding the child and, accordingly, should be deemed to have forfeited any sympathy or consideration by this Court. She was declared to have committed a contempt of Court (52a). Any semblance of approval for such improper action by the petitioner would encourage others to emulate her—to "take the law" in their hands. Moreover it was well phrased in *Lang* v. *Lang,* 9 A. D. 2d 401, 405 (aff'd 7 N. Y. 2d 1029), when the court said:

> ". . . a contemptuous wrongdoer should have no standing to obtain relief in a court."

It is also of interest that said opinion also declared that the mere fact that one parent has achieved an economic improvement does not warrant a transfer of the custody of a child to that parent.

A decision favorable to this petitioner would be a reward to a litigant who comes into court with unclean hands, having committed a lawless act. See Ratner, Child Custody in a Federal System, 62 Mich. Law Rev. 795 (1964). One can conjecture that should the petitioner gain the approval of this Court to her high handed action, and thus have the right to retain the child, thereafter this respondent would resent such a judicial reaction with the perhaps understandable layman's reaction to imitate the petitioner's wrongful tactics. The inevitable result could readily be armed guards on both sides, a series of unending applications to courts, forum shopping, revolving door litigation, a child buffeted between opposing parents and living in armed camps—a shocking prospect. Where would it end?

Mr. Justice Rutledge commented on this struggle in *Halvey* v. *Halvey,* 330 U. S. 610, 619-620, 67 S. Ct. 903, 91 L. Ed. 1133, 1138-1139.

> "The result seems unfortunate in that, apparently, it may make possible a continuing round of litigation over custody, perhaps also of abduction, between alienated parents. That consequence hardly can be thought conducive to the child's welfare . . . The effect of the decision may be to set up an unseemly litigious competition between the states and their respective courts as well as between parents. Sometime, somehow, there should be an end to litigation in such matters."

A definitive ruling against a court—defying parent would have a salutary effect.

CONCLUSION

The petition for a writ of certiorari herein should be denied, with costs.

Respectfully submitted,

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